Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LEVEL 3 COMMUNICATIONS, LLC ***Complainant,*** ***v.*** **AT&T INC.; BELLSOUTH TELECOMMUNICATIONS, LLC; NEVADA BELL TELEPHONE COMPANY; PACIFIC BELL TELEPHONE COMPANY; SOUTHWESTERN BELL TELEPHONE, L.P.; ILLINOIS BELL TELEPHONE COMPANY; MICHIGAN BELL TELEPHONE COMPANY; OHIO BELL TELEPHONE COMPANY; AND WISCONSIN BELL TELEPHONE COMPANY,** ***Defendants.***	**EB Docket No. 17-227** **File No. EB-17-MD-003**

AT&T BRIEF IN SUPPORT OF ANSWER

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INTRODUCTION AND SUMMARY

In 2011, the Commission adopted the *Transformation Order*, which established an initial, multi-year transition to bill-and-keep for certain types of intercarrier compensation. The Commission recently confirmed that, in this initial phase of its transition to a bill-and-keep system, Rules 51.907(g) and (h)[1] require price cap LECs to phase out tandem charges "*only* when the terminating price cap carrier also owns the tandem in the serving area"[2] – *i.e.*, when the price cap

[1] 47 C.F.R. §§ 51.907(g), (h).

[2] Public Notice, "Parties Asked To Refresh The Record On Intercarrier Compensation Reform Related To The Network Edge, Tandem Switching And Transport, And Transit," WC Docket No.

LEC owns both the tandem and the end office. This reading of the rules is the only viable interpretation of the language of the regulations and the accompanying discussion in the *Transformation Order*.[3] In July, all price cap LECs in the industry filed tariffs consistent with that interpretation, in accordance with prior guidance from Commission staff. Indeed, Level 3's tariff, which must benchmark to ILEC rates under the CLEC access charge rules, treats tandem charges in the same manner as AT&T. The Commission is currently in the process of taking a new round of comment on how to transition all *other* price cap LEC tandem charges to a bill-and-keep system as part of its still-pending, follow-on Further Notice of Proposed Rulemaking.[4]

Level 3's Complaint is premised on an alternate reality in which the Commission adopted an entirely different rule in 2011, and everyone in the industry complied with that different rule, except AT&T. Level 3 thinks the Commission already decided, when it adopted Rules 51.907(g) and (h) in 2011, that price cap LECs must *also* apply the step-downs for tandem charges when the price cap carrier hands traffic off to an affiliated wireless or VoIP provider. Although Level 3's real disagreement is with the Commission's rule, Level 3's Complaint falsely paints AT&T as a "rogue" carrier that has willfully misread a regulation that is "clear" on its face and to everyone else. And Level 3 spends much of its Complaint making policy arguments that Level 3's position *should* be the rule – even though the only question in this complaint case is what the Commission actually decided in 2011.

10-90; CC Docket No. 01-92, at 2 (released September 8, 2017) (emphasis added) ("*Tandem Refresh Public Notice*") (emphasis added).

[3] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, 26 FCC Rcd 17663, ¶¶ 819, 1312 (2011) ("*Transformation Order*").

[4] *See Tandem Refresh Public Notice*; *Transformation Order* ¶¶ 1297-1325 (Further Notice of Proposed Rulemaking, or "*FNPRM*").

Level 3 had to create this alternate reality, because the real facts establish that its arguments are without merit. Level 3's position cannot be squared with the language of the rule, the discussion in the *Transformation Order* and *FNPRM*, or sound policy. First, Level 3's interpretation of the regulation is grammatically nonsensical. Rule 51.907(g)(2) is entitled "Transition of price cap carrier access charges," and provides that "[e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute." 47 C.F.R. § 51.907(g)(2). Level 3 insists that the term "terminating carrier" must be pulled out of context and interpreted to mean *any* entity that "performs end office switching functions, or their equivalent, and then delivers the call to the called party," whether it is a Price Cap Carrier or not.[5] This unbounded reading of "terminating carrier" is necessary to Level 3's position here, because its argument is that the Price Cap Carrier must apply the step-downs when it is the "affiliate" that owns the tandem, even if the terminating carrier is not the Price Cap Carrier.

But Level 3's interpretation must account for all situations in which the "terminating carrier" *or* "its affiliate" owns the tandem. If the "terminating carrier" can be any entity terminating a call, then the sentence makes no sense. Under Level 3's interpretation, the regulation literally says that a Price Cap Carrier may charge $0.0007 per minute any time traffic traverses the tandem switch of any terminating carrier in the country.[6] That is obviously an absurd result and

[5] Formal Complaint of Level 3 Communications, LLC, *Level 3 v. AT&T*, EB Docket No. 17-227, ¶ 28 (filed Sept. 12, 2017) ("Complaint"); *see also id*. ¶ 34.

[6] If one were to substitute Level 3's supposedly "well-settled" meaning of the term "terminating carrier" into Rule 51.907(g), Complaint ¶ 28, the Rule would state as follows: "[e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that ['the carrier that performs end office switching functions or their equivalent and then delivers the call to the called party'] or its affiliates owns, Tandem-Switched Transport Access Service

renders Level 3's interpretation untenable. The sentence makes grammatical and regulatory sense only if "terminating carrier," which appears in a subordinate phrase, is read as a reference back to the Price Cap Carrier at the beginning of the sentence (and which is the entity named in the title of, and that is subject to, Rule 51.907): *i.e.*, the Price Cap Carrier must charge $0.0007 or less *when it is* "the terminating carrier."

Level 3's interpretation also improperly assumes that the Commission has already decided important and difficult questions that are actually still at issue in the *FNPRM* and the current round of comment to refresh the record. In the *Transformation Order*, the Commission recognized that situations in which the Price Cap Carrier did not have its own end user customer taking service pursuant to access tariffs raised fundamentally different issues for a default bill-and-keep scheme. In particular, how to treat those more difficult scenarios is inextricably bound with the question of where to set the "network edge" – the point beyond which the terminating provider cannot charge other carriers for transport and termination. That is why the *Transformation Order* repeatedly states that the initial rule "does *not* address the transition in situations where the tandem owner does not own the end office."[7]

Level 3 is arguing, in effect, that the Commission has already decided that the network edge for the traffic at issue should be placed at the price cap LEC tandem. But the Commission has not made that decision. The question of where to set the network edge for such traffic raises

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rates no greater than $0.0007 per minute." Level 3's reading of "terminating carrier" in this context makes no sense, whereas the Rule is entirely sensible and can be applied easily in practice so long as "terminating carrier" to refers to the price cap LECs that are the subject of the rule.

[7] *Transformation Order* ¶ 1312 (emphasis added); *see also id.* ¶ 819 ("For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. However, transport charges in other instances, *i.e.*, where the terminating carrier does not own the tandem, are not addressed at this time.").

a host of issues relating to wireless and VoIP competition that the *Transformation Order* does not discuss and certainly does not resolve. To the contrary, the Commission did not have an adequate record to decide those issues in 2011, because it had "not received significant comment on the network edge issue up to this point."[8]

Equally important, the central premise of the Complaint – that the intercarrier compensation payments for the tandem services at issue will inevitably be reduced to zero – is *not correct*. As the Commission's recent Public Notice makes clear, the Commission is still considering whether to set the network edge at the mobile switching center for wireless traffic, and at the media gateway for VoIP traffic.[9] If the Commission adopts those proposals, Level 3 would retain the responsibility to deliver the traffic all the way to those network edges – which means that Level 3 would have to compensate AT&T whenever Level 3 elects to use AT&T's tandem and transport to reach those network edges, just as it does today.

Level 3's various policy arguments are wrong, but also irrelevant. Level 3 makes a series of policy arguments, as if the Commission were considering, for the first time, how to implement a transition for tandem switched services. That is quite plainly a false construct. The Commission is not writing on a clean slate, and cannot simply decide, on policy grounds, that it *should* adopt Level 3's position. The only question in this case is what the Commission's 2011 rules mean and what policies it adopted in 2011. There is no serious doubt about that question, and the Commission and its Staff have already provided the answer. Further, the answer can readily be determined by the text of the rule and the context, including which issues the Commission

[8] *Id.* ¶ 1320.

[9] *Tandem Refresh Public Notice* at 2.

addressed in the 2011 *Transformation Order*, and which ones it left for the *FNPRM*. This case does not call upon the Commission to make any policy judgments.

Moreover, the fact that the Commission consciously chose to pursue a piecemeal approach to the transition, and thus adopted a rule that addresses some tandem switching scenarios but not others, does not "undermine[] the *Transformation Order*'s objectives."[10] The rule at issue is an initial step, and it fully resolves the subjects it addresses. Level 3's real complaint is that the Commission has not resolved the *FNPRM*, and Level 3 should direct its policy arguments to the Commission in the current round of comment to refresh the record. The appropriate course for resolving these lingering issues is to complete the *FNPRM* expeditiously, as the Commission now seems to be doing – not to misconstrue and misapply Rule 51.907(g) (and thereby prejudge those issues without a full, industrywide record). In all events, as explained below, Level 3's specific policy arguments lack merit.

In short, AT&T's – and the Commission's – interpretation of the rules at issue is correct and, indeed, the only reasonable interpretation of the regulation and the *Transformation Order*. AT&T's tariffs, like those of all other price cap carriers in the industry, comply with the rule and are therefore lawful. Accordingly, there is no basis for a finding of liability against AT&T, and the Commission should dismiss the Complaint.

BACKGROUND

To place the legal issues in a proper context, it is necessary to review (i) the Commission's 2011's *Transformation Order* and the multi-year transition it implemented for certain access rate elements, (ii) its *Further Notice of Proposed Rulemaking* seeking comment on the transition for

[10] Complaint ¶ 38.

other rate elements and "network edge" rules, and (iii) the various Commission proceedings related to the Commission's partial transition for tandem and transport prices for price cap carriers.

A. The Commission's Partial Reform of Intercarrier Compensation and Its Gradual Transition of Certain Specified Rate Elements.

The Transformation NPRM. In February 2011, the Commission proposed broad, multi-year reforms to its existing intercarrier compensation system: it proposed adopting "near-term" reforms that "sequenc[ed]" access "rate reductions" to ensure "appropriate timing of [an] overall transition," and then outlined, as a "future-state," a "long-term framework to gradually reduce all per-minute charges."[11]

As to the near-term reductions, the Commission believed it was "prudent to adopt interim, temporary rules that provide for a gradual, phased implementation of our proposed reforms."[12] The Commission noted that, while it was possible "in principle" that "all categories of intercarrier compensation rates could be reduced from the beginning of the transition period," a decision to "reduc[e] all rates concurrently" would both complicate universal service reform and add to the "complexity of issues that need to be addressed earlier in the transition process, as compared to an approach that deferred certain types of rate reductions until later in the process." *Id.* ¶ 553. The Commission thus sought comment on, *inter alia*, "how rate reductions should be structured and implemented."[13]

The Commission also sought comment on rules for "network edges."[14] As the Commission explained, "proposals to treat traffic under a bill-and-keep methodology typically assume the

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[11] Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 4554, ¶¶ 34, 40, 42 & Fig. 3 (2011) ("*Transformation NPRM*").

[12] *Id.* ¶ 521.

[13] *Id.* ¶ 554.

[14] *Id.* ¶ 680.

existence of a network edge, beyond which terminating carriers cannot charge other carriers to transport and terminate their traffic. This approach requires that the calling party's service provider transmit, route and otherwise perform all the network functions necessary to deliver traffic to the network edge of the called party's service provider."[15] The Commission noted that, in past reform proposals, a variety of different network edges had been proposed. *Id.*

Transformation Order. In November 2011, the Commission released its *Transformation Order*, in which it determined that a "uniform national bill-and-keep framework" would eventually be the default regime.[16] Consistent with the *NPRM*, the Commission did not immediately move to bill-and-keep as the default regime, nor did the Commission apply its transitional rate reductions to all types of switched access services. Instead, the Commission adopted a "gradual and measured" "multi-year transition," and did so for only some switched access rate elements – such as terminating end office switching and "certain transport rate elements" – and for only certain carriers in specific circumstances. *Transformation Order* ¶¶ 35, 798, 800. For other rate elements, including originating access services, and other tandem switching and tandem transport services, the Commission did not "specify the transition to reduce these rates" and instead asked for further comment, which was received in 2012. *Id.* ¶ 800; *see id.* ¶¶ 1297-1325 (the *FNPRM*); *see infra* Background, Part B.

The Commission explained that "[s]pecifying the timing and steps for the transition to bill-and-keep requires us to make a number of line-drawing decisions." *Id.* ¶ 809. The Commission rejected any "flash cut" approaches, finding that they would "entail significant market disruption to the detriment of consumers and carriers alike." *Id.* The Commission's transition was intended

[15] *Id.*

[16] *Transformation Order* ¶¶ 34, 736.

to "strike the right balance between our commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes," while furthering the goal of overall reform. *Id.* ¶ 802; *see id.* ¶ 801.

After considering a variety of proposals in the record as to these line-drawing decisions, *see id.* ¶ 799, the Commission's initial rate reductions in tariffed access charges focused on reducing the difference between intrastate and interstate terminating rates and then on reducing terminating end office rates. *See id*. ¶ 800 (the rules focus first on where the "most acute intercarrier compensation problems, such as arbitrage, currently arise"); *see id*. ¶ 804 n.1508. The Commission thus determined that, as part of its initial transition, terminating intrastate access rates should be brought into parity with interstate rates, and that terminating end office rates be transitioned to zero over a multi-year period.[17]

The Commission also determined that it was appropriate to adopt different transitions for price cap carriers (and CLECs that benchmark to price cap carriers) and for rate-of-return carriers. *Id.* ¶ 801. The Commission promulgated one rule for rate-of-return carriers and another rule – Section 51.907, entitled "Transition of price cap carrier access charges" – that applies the transition to price cap carriers. 47 C.F.R. § 51.907; *id.* § 51.909 (rate-of-return carriers).[18]

In Section 51.907, the Commission provided that, in two steps, price cap carriers should reduce their tariffed intrastate terminating switched end office and transport rates and reciprocal

[17] The Commission also capped "all interstate switched access and reciprocal compensation rates" as of the date of the *Order*, which was December 29, 2011. *See Transformation Order* ¶ 801. The Commission also adopted an "Access Recovery Charge" ("ARC") so as to "mitigate the effect of reduced intercarrier revenues on carriers." *Id.* ¶ 36. The ARC could be assessed only by incumbent LECs, and not CMRS carriers. 47 C.F.R. § 51.713.

[18] Although the Commission had considered adopting specific rules applicable to CMRS carriers, *see Transformation NPRM* ¶ 511, the Commission explained in the *Transformation Order* that the transition rules apply to CMRS carriers only "to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here." *Transformation Order* ¶ 801 n.1498; *see id.* ¶ 806.

compensation to parity with the interstate access rate by July 1, 2013. 47 C.F.R. § 51.907(b), (c); *Transformation Order*, ¶ 801. As steps three, four, and five, the Commission required price cap carriers to reduce tariffed terminating switched end office and reciprocal compensation to $0.0007 by July 1, 2016.

In step six, the Commission provided that tariffed terminating end office charges would be eliminated for price cap carriers, 47 C.F.R. § 51.907(g)(1), and it also began the transition for some – but not all – transport elements. *Transformation Order*, ¶¶ 819, 1306-12. Specifically, Section 51.907(g)(2) provides that

> [e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute.

For step seven, Section 51.907(h) provides that

> [b]eginning July 1, 2018, notwithstanding any other provision of the Commission's rules, each Price Cap carrier shall, in accordance with bill-and-keep, as defined in §51.713, revise and refile its interstate switched access tariffs and any state tariffs to remove any intercarrier charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier or its affiliate owns.

Accordingly, the final steps in the Commission's initial, partial transition provide for a stepdown of certain tandem transport rates, specifically, when a price cap carrier owns the tandem and end office service. *See id.*; *see also infra* Part I.A. However, the Commission explained that "transport charges in other instances, *i.e.*, where the terminating carrier does not own the tandem, are not addressed at this time." *Transformation Order* ¶ 819. The appropriate treatment of these other transport charges would be addressed after the Commission received further comment.

B. The Commission's Request For Further Comment As To Network Edge Rules And Remaining Access Rate Elements.

The Commission's 2011 *Transformation Order* also sought further comment on, *inter alia*, the transition for "rate elements that are not specifically addressed in the *Order*, including originating and transport." *Transformation Order* ¶ 1296; *id.* ¶ 1297 (noting that the Commission did not implement the transition for "tandem switching and tandem transport in some circumstances"). The Commission explained that it would "seek to reach the end state for all rate elements as soon as practicable, but with a sensible transition path that ensures the industry has time to adapt to changed circumstances." *Id.*

As to the remaining tariffed transport charges, the Commission specifically noted that commenters had "express[ed] concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office." *Id.* ¶ 1312. The Commission explained that Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch," but it "does not address the transition in situations where the tandem owner does not own the end office." *Id.* The Commission thus sought comment on both the transition and "the appropriate end state" for such intermediate tandem switching services. *Id.* ¶¶ 1306-10, 1312-13.

Moreover, as the Commission noted, many of those issues are "closely related" to the issue of how to establish the "network edge" for purposes of a bill-and-keep rule applicable to such tariffed tandem services. *Id.* ¶ 1310. As the Commission explained, a "critical aspect to bill-and-keep is defining the network 'edge' for purposes of delivering traffic." *Id.* ¶ 1320. This is because the edge is "the point where bill and keep applies," and a "carrier is responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge." *Id.* Thus, based on where the network edge is set, a carrier originating its customers' calls would be required to either deliver

traffic to the edge itself, or to pay a negotiated fee with another provider. For example, the Commission noted that "the edge could be 'the location of the called party's end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway.'" *Id.* (quoting *Transformation NPRM*, ¶ 680). On calls to wireless customers, if the network edge were set at the called party's mobile switching center, then an originating carrier that did not itself deliver the calls to that point would be paying another provider a negotiated rate for transport. The Commission thus invited comments on "the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport." *Id.* ¶ 1310. The Commission, however, emphasized that it had not and could not decide any of these issues in 2011, because it had "not received significant comment on the network edge issue up to this point." *Id.* ¶ 1320.

C. The Commission's Recent Proceedings on The Existing Transition.

Despite the Commission's request for further comment, and its statements that "failure to take action promptly" on the *FNRPM* "could perpetuate inefficiencies, delay the deployment of IP networks and IP-to-IP interconnection, and maintain opportunities for arbitrage," *Transformation Order* ¶ 1297, the Commission has yet to put in place additional transition rules. For price cap carriers, the Commission's initial transition is due to end as of July 2018, and in 2011 the Commission clearly expected that a further transition would be in place – and possibly even complete – by this time. *See id.* ¶ 801; *see, e.g.*, *id.* ¶¶ 1299, 1308 (noting that some commenters "suggest[ed] that transport rates be reduced at a pace that coincides with our current transition for end office switching"). In light of the inaction, AT&T last year filed a Petition for Forbearance, in which it both (i) urged the Commission to take prompt steps to complete intercarrier compensation reforms and (ii) demonstrated that immediate forbearance relief as to certain charges

(tandem and transport associated with access stimulation, and 8YY database query charges) was required under the criteria Congress established in 47 U.S.C § 160.[19]

1. The Staff's Guidance on the Transition. Even though no further transition has been set, the Commission and its Staff have engaged this year in a number of proceedings to address the final steps of the initial transition. In April of this year, the Commission's Staff issued its annual order in which it detailed the various material that LECs should include with their access filings to implement the transition, which included the required step-down for transport and termination provided by price cap carriers when they route calls to their own price cap LEC end offices.[20] Consistent with past practices, the price cap LECs informally met with Commission Staff to discuss the tariff filings, and in doing so, the price cap LECs asked for and received guidance from Commission Staff on the step-downs required by Section 51.907(g).[21]

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[19] Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c), *Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges*, WC Docket No. 13-363, at 3 (filed Sept. 30, 2016) ("AT&T Forbearance Petition").

[20] Order, *Material to be Filed in Support of 2017 Annual Access Tariff Filings*, 32 FCC Rcd 3168, ¶ 15 (2017) (noting that "[t]his year, the Access Reduction Spreadsheets" which identify "rates that are required to be reduced pursuant to section 51.907(b)-(g) of the Commission's rules, and calculate the amount of the reductions" have been "modified to reflect rate reductions required by section 51.907(g) of the Commission's rules.").

[21] *See* Petition of Century Link for Limited Stay of *Transformation Order* Years 6 And 7 ICC Transition – As It Impacts A Subset Of Tandem Switching And Transport Charges, *Connect America Fund, et al.*, Docket Nos. 10-90, *et al*., at 2-3, 6 (filed Apr. 11, 2017) ("*CenturyLink Stay Petition*") (price cap "carriers have had a number of discussions within customary industry discussion groups formed to assist carriers as they anticipate the complexities associated with their annual tariff filings and those groups have reached-out to Commission staff, as is customary, for related guidance."). *See also, e.g.*, 47 C.F.R. § 0.91(k) (the functions of the Wireline Competition Bureau include interactions with "industry groups on wireline telecommunications regulation and related matters."); 47 C.F.R. § 1.1204(b)(3) (exempting communications to and from Commission personnel relating to tariff proceedings before being set for investigation from Commission *ex parte* rules).

The Commission Staff confirmed that, where the price cap carrier owns both the tandem switch and the subtending end office, the price cap carrier's tariffed terminating tandem and transport rates should be stepped down to $0.0007 per minute. *See CenturyLink Stay Petition* at 6 (describing guidance). The Commission Staff also confirmed that the step down in Section 51.907(g) does not apply when the price cap carrier does not operate both the terminating tandem switch and the terminating end office switch. *See id.* This would include situations when the price cap carrier hands off the call to the end office of an unaffiliated entity that is not a price cap carrier. *See id.* And, critically for this proceeding, the Commission Staff confirmed that, when price cap carriers use their tandem to hand off calls for termination to a wireless carrier's facility, the step down in Section 51.907(g) also does not apply. *See id*. As explained below, in the latter situations, when the price cap carrier does not own both the tandem and end office, the Commission would need to consider additional and more complex questions, including the choice of the network edge; accordingly, it would be premature to step down tandem and transport rates until the Commission has set a further transition and has addressed the network edge and other issues. *See infra* Part I.A.

2. The CenturyLink Stay Petition. Not long after the Commission Staff's guidance, CenturyLink, which is Level 3's proposed merger partner, asked the Commission to "stay" Sections 51.907(g) and (h), which set forth the step-downs for price cap carriers' terminating tandem and transport rates. *See CenturyLink Petition for Stay*, at 1-2. Even though Level 3's Complaint in this proceeding argues that the step-downs are clear, the asserted basis for the CenturyLink stay request was that the step-downs had "ambiguities and contradictions." *Id.* at 6. Contrary to Level 3's position that Section 51.907(g) can only be interpreted in the way Level 3 is proposing, Level 3's merger partner believed that there would be a "confusing morass" and

considerable "disagreement and confusion" about how to implement the step-downs. *Id.* at 2-3. AT&T opposed the Petition on multiple grounds – arguing that the Commission should not stay its existing reforms but instead should move forward with the remaining reforms. AT&T also explained that price cap carriers would be able to implement the step-downs in Section 51.907(g) and (h) without difficulty, both because of the Staff's guidance, and because the Staff's guidance was the most reasonable reading of the Commission's rules.[22] The Commission has not acted on CenturyLink's petition.

3. Price Cap LECs' Implementation of the Staff Guidance And The Commission Staff's Denial Of Petitions to Suspend. A few months later, price cap LECs (and CLECs benchmarking to price cap LECs) began to file revisions to their access tariffs reflecting the step-downs required by Section 51.907(g).[23] Contrary to CenturyLink's predictions, there was no serious confusion, and all price cap carriers implemented Section 51.907(g) consistently and as determined by the Commission's Staff's guidance. In other words, no price cap carrier implemented Section 51.907(g) in the manner that Level 3 suggests is compelled by the text of the rule. All price cap LEC carriers have filed tariffs that price their terminating tandem and transport access services at $0.0007 when the price cap LEC owns both the terminating tandem and end office switches. No price cap LEC carrier has stepped down its terminating tandem and transport rates down to $0.0007 when the price cap carrier hands off calls to a wireless carrier.

In fact, Level 3 itself has revised its access tariff to reflect this reading of the rule. For its "Switched Transport Usage Rates – Tandem Switching & Multiplexing," Level 3's tariff provides

[22] Comments of AT&T in Opposition to CenturyLink Petition for Stay, *Connect America Fund*, WC Docket No. 10-90, at 11-15 (filed May 4, 2017) ("AT&T Opp. To Stay Petition").

[23] *See, e.g.*, Ameritech Operating Companies Description and Justification, Transmittal No. 1859, at 1 (June 7, 2017).

for two types of terminating access rates: "Terminating – To Company End Office" and "Terminating – To 3rd Party."[24] While the tandem rates for "Company End Office" have been stepped down so that they do not exceed $0.0007 per minute, any other tandem switching charges have not been stepped down and remain priced at their previous levels. *See id.*

Even though the price cap LECs' access tariff revisions complied with the requirements of Rule 51.907(g) and the Commission Staff's guidance of that provision, several parties, including Level 3, filed Petitions to Suspend some of the tariffs. *See generally July 1, 2017 Annual Access Charge Tariff Filing,* WC Docket No. 17-65. Level 3's Petition, which was not timely filed, raised the same types of arguments it raises in this proceeding, and claimed that AT&T's access filings were "flatly inconsistent with the terms of Section 51.907(g)(2)."[25] AT&T and other price cap LECs opposed the petitions[26], and on July 7, 2017, the Commission issued a Public Notice in which it stated that "[w]e conclude that none of the parties filing petitions against the tariff transmittals at issue have presented compelling arguments that the transmittals are so patently unlawful as to require rejection. Similarly, we conclude that none of the parties have presented issues regarding the tariff transmittals that raise significant questions of lawfulness which require

[24] Level 3 Communications, LLC, Tariff F.C.C. No. 4, §§ 15.1.3.4.5.2, 15.1.3.4.5.3; Original Pages 68.1 to 68.4 (filed July 14, 2017). In the Level 3 tariff, "Company" is defined as "Level 3 Communications, LLC, the issuer of this tariff." *Id.* § 1, Third Rev. Page 6. Thus, to the extent Level 3 were to pass on calls to an affiliate, including any affiliated CLEC, VoIP provider, or CMRS provider), Level 3's tariff provides that Level 3 (like AT&T, other price cap LEC and benchmark CLEC carriers) will not charge a $0.0007 rate for tandem service.

[25] Petition Of Level 3 To Reject Or Suspend And Investigate, *July 1, 2017 Annual Access Charge Tariff Filings*, WC Docket No. 17-65, at 5 (filed June 23, 2017). Even though all price cap LECs implemented their tariff filings uniformly, Level 3 filed a petition to reject only AT&T's tariffs.

[26] AT&T's Opposition to Petitions of Level 3 and Sprint Corporation to Reject or to Suspend and Investigate AT&T Tariff Filings, *Annual Access Charge Tariff Filings*, WC Docket No. 17-65 (filed June 27, 2017); Opposition of Verizon to the Petitions to Reject and Suspend, *July 1, 2017 Annual Access Charge Tariff Filings*, WC Docket No. 17-65 (June 27, 2017).

their investigation."[27] AT&T's tariffs, which were filed on fifteen days' notice pursuant to 47 U.S.C. § 204(a)(3), were thus not suspended and became deemed lawful.

4. The Commission's Recent Refresh Public Notice. On September 8, 2017, the Commission issued a Public Notice asking parties to refresh the record as to the transition issues left open in the *Transformation Order*.[28] In that release, the Commissioned noted that it still had not addressed the network edge, or the remaining categories of access charges not subject to the initial transition. In particular, as to tandem and transport, the Commission confirmed, yet again, that the "rate transition adopted in the *USF/ICC Transformation Order* reduced tandem switching and transport charges only when the terminating price cap carrier also owns the tandem in the serving area." *Id.* at 2.

ARGUMENT

I. AT&T'S – AND THE COMMISSION'S – INTERPRETATION OF RULE 51.907(g)(2) IS CORRECT.

It is well established that, in order "[t]o ascertain how best to interpret [a Commission rule], we must examine the rule's text, history, purpose, and structure."[29] AT&T's interpretation of the rule – which comports with the interpretation of the staff, all price cap carriers in the industry, and the Commission itself in the *Tandem Refresh Public Notice* – is compelled by the language and structure of the regulation and the accompanying discussion of the rule's history and purpose in the *Transformation Order*. Level 3's alternative interpretation, by contrast, (1) relies on an interpretation of the regulation that is grammatically nonsensical; (2) disregards the context and

[27] Public Notice, *Protested Tariff Transmittals, No Actions Taken*, DA 17-654, WC Docket No. 17-65 (rel. Jul. 7, 2017).

[28] *See Tandem Refresh Public Notice*.

[29] *Center For Commc'ns Mgmt. v. AT&T Corp*., 23 FCC Rcd. 12249, ¶ 11 (2008).

wishes away the *Transformation Order* by ignoring or misreading that order's extensive discussion of these issues; and (3) rests on policy arguments that are irrelevant to this complaint proceeding but are misguided in all events.

A. Rule 51.907(g)(2) Applies Only To Price Cap LECs That Own The End Office.

The rules at issue apply to "Price Cap Carriers" that are also "the terminating carrier" – *i.e.*, the carrier that is actually terminating the call to the end user and thus owns the end office switch.[30] This is clear from both the text of the regulation and the *Transformation Order* – which, as a matter of law, *together* constitute the rule.[31]

The *Transformation Order* explains clearly how the rule works. The initial transition to bill-and-keep as the default regime focuses on Price Cap Carriers that own the end office, because from the Commission's perspective in 2011, carriers in that situation presented the simplest and most straightforward scenario for the initial transition to bill-and-keep. Price Cap Carriers in that situation have end user customers that take service pursuant to tariffs.[32] Bill-and-keep for such

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[30] 47 C.F.R. §§ 51.907(g) & (h); *Transformation Order* ¶ 1312. These transitions also apply to CLECs like Level 3 that benchmark their rates to price cap carriers under the CLEC access charge rules. *Transformation Order* ¶¶ 801, 807, 866; 47 C.F.R. § 61.26. Level 3's Complaint focuses *solely* on Rule 51.907(g)(2), which requires the Year Six step-down for tandem rates to $0.0007 per minute. *See, e.g.*, Complaint ¶ 71 (prayer for relief). Level 3's Complaint never mentions Rule 51.907(h), which requires the Year Seven step-down to zero and for all relevant purposes uses the same language.

[31] When engaged in notice-and-comment rulemaking, an agency must "incorporate in the rules adopted a concise general statement of their basis and purpose," 5 U.S.C. § 553(c), and the agency's statement "should be fully explanatory of the complete factual and legal basis as well as the object or objects sought." *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (quoting S. Doc. No. 79-248 (1946)). Given that the full explanation of the rule at issue appears only in the *Transformation Order*, that discussion is just as much part of the "rule" as the text of the regulation.

[32] *See, e.g., Qwest Commc'ns Corp. v. No. Valley Commc'ns*, 26 FCC Rcd 8332, ¶ 5 (2011) ("The Commission's rules governing these [ILEC] tariffs [traditionally] provide that ILECs may recover access service costs through charges assessed on both IXCs and 'end users.'"), *aff'd*, 717 F.3d 1017 (D.C. Cir. 2013).

carriers can thus be handled entirely within the existing access charge regime, because such carriers can simply shift the recovery of their tandem and end office switching costs to their end user tariffs, to the extent appropriate.[33] Rule 51.907 thus establishes a gradual transition in which such a Price Cap Carrier's switching charges are slowly phased out, beginning with end office charges and ending, in Years Six and Seven, with such a carrier's tandem charges.

The Commission issued a further notice of proposed rulemaking to establish a separate bill-and-keep transition for all *other* price cap LEC tandem charges. In 2011, the Commission reasonably concluded that the transition for tandem charges when the price cap LEC does *not* own the end office switch, and thus has no end user customers, presented very different issues. The *FNPRM* specifically noted that commenters had "express[ed] concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office."[34] In response, the Commission explained that Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch," but it "does *not* address the transition in situations where the tandem

[33] *Cf.* 47 C.F.R. § 51.713. To that end, the Commission adopted the Access Recovery Charge ("ARC"), which is a "transitional recovery mechanism" from certain end users (or the CAF Fund) that helped offset the loss of revenues "reduced as part of this Order." *Transformation Order* ¶ 847. The Commission allowed "incumbent LECs" – either price cap LECs or rate of return LECs – to recover the ARC from specified end users, but not CMRS carriers. *Id.* ¶ 864 n.1668. Although the ARC was never intended to be revenue neutral, the fact that the Commission provided for a partial transitional recovery mechanism for price cap LECs and rate of return LECs, but not CMRS carriers, further undercuts the view that Section 51.907(g) or (h) apply when the terminating carrier is a CMRS provider (or otherwise not the Price Cap LEC).

[34] *Transformation Order* ¶ 1312.

owner does not own the end office."[35] The Commission sought comment on both the transition and "the appropriate end state" for such intermediate tandem switching services.[36]

Equally important, the Commission explained that issues relating to these intermediate tandem services are "closely related" to the issue of how to establish the "network edge" for purposes of a bill-and-keep rule applicable to such tandem services.[37] In 2011, the Commission concluded that the rules for how bill-and-keep will work for such intermediate tandem charges, and where the network edge is established, could have a substantial and perhaps far-reaching impact on how those services are purchased and provided. The Commission was not ready to resolve those issues based on the record it had accumulated in 2011 – indeed, the Commission had received no "significant comment" on those issues – and thus it sought comment on those issues in the *FNPRM* as well.[38]

The Commission recently confirmed that this interpretation of the rule is correct. In its Public Notice seeking to refresh the record in the *FNPRM* on these issues, the Commission explicitly stated that "[t]he rate transition adopted in the *USF/ICC Transformation Order* reduced tandem switching and transport charges *only when the terminating price cap carrier also owns the*

[35] *Id*. (emphasis added); *see also id*. ¶ 819 ("For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. However, transport charges in other instances, i.e., where the terminating carrier does not own the tandem, are not addressed at this time.").

[36] *Id.* ¶¶ 1306-10, 1312-13.

[37] *Id*. ¶ 1310 ("As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport"); *id.* ¶¶ 1315-21 (seeking comment on points of interconnection and the "network edge" in a full bill-and-keep system).

[38] *Id.* ¶¶ 1320-21.

tandem in the serving area."[39] The Commission then stated that "[i]n light of developments that have occurred since the order was adopted, we seek to refresh the record on issues surrounding transition of the *remaining* tandem switching and transport charges to bill-and-keep."[40] And the Commission made clear that it has not decided where the network edge will be set for the traffic at issue – reiterating, for example, that it still sought comment on whether the network edge should be set at the "mobile switching center" for wireless traffic and at the "media gateway, or trunking media gateway," for VoIP traffic.[41]

The text of the regulation mandates the same outcome. Rule 51.907(g)(2) provides that "[e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute." 47 C.F.R. § 51.907(g)(2). The phrase "the terminating carrier" makes grammatical sense only as a reference back to the "Price Cap Carrier" – *i.e.*, a Price Cap Carrier must phase out its tandem charges when it is "the terminating carrier" and, as such, owns both the end office and tandem switches.[42] The rule includes the reference to "the terminating carrier" in part to make clear that transition applies only to the Price Cap Carrier's terminating services, not to originating access. If the "terminating carrier" could be

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[39] *Tandem Refresh Public Notice* at 2 (emphasis added), citing *Transformation Order* ¶ 819 ("For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. However, transport charges in other instances, i.e., where the terminating carrier does not own the tandem, are not addressed at this time.").

[40] *Tandem Refresh Public Notice* at 2 ("Specifically, we seek comment on what steps the Commission should take to transition the remaining elements associated with tandem switching and transport to bill-and-keep.").

[41] *Id.* at 1-2 & n.10.

[42] *Transformation Order* ¶ 1312 (Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the *terminating carrier* owns the serving tandem switch," but not "where the tandem owner does not own the end office" (emphasis added)).

a carrier *other* than the Price Cap Carrier (such as a CLEC or a CMRS carrier), then the rule makes no literal sense and, under Level 3's interpretation, would already address many of the more difficult intermediate situations on which the Commission sought comment in the *FNPRM* (and on which it currently has asked for a refreshing of the record "in light of developments" since 2011).

This understanding of "terminating carrier" also eliminates any ambiguity with respect to the term "affiliate" in the regulation. The regulation requires the Price Cap Carrier to phase out its tandem charges when the "terminating carrier or *its* affiliate" – *i.e.*, the terminating carrier's affiliate – owns the tandem. As discussed above, however, the "terminating carrier" can only be a Price Cap Carrier that owns the end office. Accordingly, the term "affiliate" comes into play only when the "*terminating*" price cap carrier that owns the end office has an affiliate that owns the tandem. The *Transformation Order* does not address why the phrase "or its affiliates" was added to the text of the regulation – indeed, the illustrative chart in the order omits the phrase "or its affiliates."[43] The addition was most likely designed either (1) to prevent a Price Cap LEC from trying to evade the tandem transition by transferring its tandem assets to an affiliate, or (2) to cover situations in more rural areas where a price cap LEC's end user is served by the tandem of a neighboring affiliate.

When read in context, as is essential, the Rule's meaning is unmistakable: Rule 51.907(g)(2) prescribes a "rate transition [that] reduce[s] tandem switching and transport charges only when the *terminating price cap carrier* also owns the tandem in the serving area."[44]

[43] *Cf. id.* ¶ 801 & Figure 9 (omitting the phrase "or its affiliates").

[44] *Tandem Refresh Public Notice* at 2 (emphasis added).

B. Level 3's Alternative Interpretation Of The Rule Makes No Sense In Terms Of The Language Of The Regulation, The *Transformation Order* And *FNPRM*, Or Sound Policy.

1. Level 3's Interpretation of the Language of the Regulation Is Grammatically Nonsensical.

Level 3's principal argument focuses on the language of the regulation in isolation, ignoring the larger context of the *Transformation Order*.[45] And within the regulation, Level 3 focuses on three *terms* in isolation: "Price Cap Carrier," "terminating carrier," and "affiliates." Level 3 argues that each of these terms has a "clear and unambiguous meaning" that must be given full effect, even if the result is at odds with the Commission's clear intent as explained in the *Transformation Order*.[46] Level 3's theory founders on its interpretation of "terminating carrier," however, for two reasons: (1) Level 3 ignores the grammar of the sentence it is interpreting, and (2) its interpretation of "terminating carrier" fails on its own terms in all events.

First, Level 3's reading of the regulation is grammatically nonsensical. Level 3 insists that "terminating carrier" must be treated as a free-floating term that has a "well-settled meaning" in "Commission precedent."[47] According to Level 3, the "terminating carrier" means *any* carrier that "performs end office switching functions, or their equivalent, and then delivers the call to the called party," whether it is a Price Cap Carrier or not.[48] But if "terminating carrier" has no relation to "Price Cap Carrier," then the regulation's sentence makes no sense. Under Level 3's reading, the

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[45] *See, e.g.*, *Verizon Cal. v. FCC*, 555 F.3d 270, 273 (D.C. Cir. 2009) ("The context is key," and the Commission "understandably . . . looked to the context"); *Bell Atlantic Tel. Cos. v. FCC*, 131 F. 3d 1044, 1047 (D.C. Cir. 1997) ("textual analysis is a language game played on a field known as 'context.'").

[46] Complaint ¶¶ 26-35.

[47] *Id.* ¶ 28.

[48] *Id.* ¶ 28; *see also id.* ¶ 34 (arguing that "'[t]erminating carrier' cannot be properly interpreted to mean the same thing as 'Price Cap Carrier'").

regulation literally would say that a Price Cap Carrier may charge $0.0007 per minute for any traffic that traverses the tandem switch of any terminating carrier in the country. In Level 3's own words, a Price Cap Carrier is "require[d]" to charge $0.0007 or less "for all calls traversing the tandem switch where the 'terminating carrier'" – which can be anyone – "*or* its affiliates" – which can be any affiliate of anyone – "owns the tandem."[49] Well-settled precedent requires the Commission to reject any interpretation of the rule that would require such patently absurd results.[50]

Level 3 never grapples with the fact that the term "terminating carrier" appears in a subordinate phrase, set off by commas, that is obviously intended to modify the main clause in the sentence. The term "terminating carrier" *must* be read as a reference back to the Price Cap Carrier at the beginning of the sentence, or else the sentence makes no sense and conflicts with the *Transformation Order*. The placement of the term "terminating carrier" within this phrase set off by commas implicitly – but *clearly* – conveys the meaning that the Price Cap Carrier must charge $0.0007 or less *when it is* "the terminating carrier" – not when any carrier that could be characterized as a terminating carrier, no matter who it is, has traffic traversing its tandem.

[49] *Id.* ¶ 27 ("Section 51.907(g)(2) thus applies to LECs that file access charge tariffs pursuant to the Commission's price cap rules and requires those entities to set the price for tandem-switched transport access service equal to $0.0007 or less for all calls traversing the tandem switch where the 'terminating carrier' or its affiliates owns the tandem"). Indeed, Level 3's interpretation would lead to the absurd conclusion that all Price Cap Carriers can simultaneously charge for all tandem traffic in the country.

[50] *See, e.g., Cellco P'ship v. FCC*, 357 F.3d 88, 90, 96 (D.C. Cir. 2004) (accepting agency's interpretation of its regulation when it "avoid[ed] absurd results"); *AT&T Corp. v. Alpine*, 27 FCC Rcd. 11511, ¶ 28 (2012) (as a consistent matter of tariff interpretation, "tariffs should be construed to avoid 'unfair, unusual, absurd or improbable results'" (quoting *Penn Cent. Co. v. General Mills*, 439 F.2d 1338, 1341 (8th Cir. 1986))).

In fact, Level 3's interpretation depends on reading the term "*affiliates*" as a reference back to "Price Cap Carrier" in the same manner in which AT&T (and the Commission and its Staff) is reading the term "terminating carrier." Under Level 3's theory, a "terminating carrier" can be literally anybody,[51] but Level 3 needs the term "affiliate" to be understood as limited to the Price Cap Carrier to avoid a nonsensical result. In this way, Level 3 is actually violating its own argument that "affiliate" is a defined term in the statute that means any entity in common ownership with another. In the context of the sentence, however, reading "affiliate" but not "terminating carrier" as referring back to the Price Cap Carrier leads to the even more broadly absurd results described above.[52]

Even if Level 3's interpretation made grammatical sense, its argument still fails on its own terms. Indeed, the "terminating carrier" in the rule cannot include VoIP providers, as Level 3 claims, because VoIP providers are not "carriers." In the *Transformation Order*, the Commission explicitly stated that it was not deciding that VoIP providers are common carriers.[53] Similarly, even when the Commission reclassified broadband Internet access service as common carriage, it made clear that services like AT&T's VoIP services were "non-BIAS data services" that are not

[51] *See* Complaint ¶ 28 (Level 3's "definition" of terminating carrier "encompasses *any* party that performs these functions, no matter what type" (emphasis in original)).

[52] Indeed, Level 3's textual argument holds together *only* in the narrow circumstance in which the Price Cap Carrier is the affiliate that owns the tandem, and *only* if the term "affiliate" is limited to the Price Cap Carrier rather than any affiliate that meets the statutory definition. Level 3's argument does not hold together if the "terminating carrier," which can be anyone, owns the tandem rather than an affiliate. As discussed above, the latter point alone is fatal to its argument, because Level 3 must sensibly account for all circumstances in which "the terminating carrier *or* its affiliate" owns the tandem – which it cannot.

[53] *Transformation Order* ¶¶ 63, 68-69.

part of the common carriage offering.[54] Level 3 cannot have it both ways: if "affiliate" is to be interpreted according to its statutory definition, then so must "carrier."[55]

2. Level 3's Efforts To Explain Away The Discussion In The *Transformation Order* And The *FNPRM* Fail.

Level 3's interpretation is not only incorrect, it improperly treats the Rule as reflecting Commission decisions on issues that in fact are still pending in the *FNPRM*. Level 3's only answer is simply to double down on its nonsensical reading of the regulation. Its argument is, effectively, that because its interpretation of the regulation is correct, then the *FNPRM* must be read to include only topics not covered by Level 3's interpretation.[56] That argument is backwards: the *Transformation Order* and *FNPRM* clearly describe the scope of the rule, and as discussed above, the language of the regulation is perfectly consistent with that description. And, as noted, the Commission itself just reaffirmed in its Public Notice that the scenarios Level 3 thinks are covered

[54] *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 35 (2015).

[55] None of the authorities Level 3 cites supports its argument that the use of the term "terminating carrier" is *this rule* encompasses VoIP providers. *See* Complaint ¶ 28 & nn.45-46. The only arguably relevant precedent is *Sprint Commc'ns Co. v. Lozier*, 860 F.3d 1052, 1057 n.4 (8th Cir. 2017), which simply states the general proposition (in a footnote) that Section 251(b)(5) applies to "traffic exchanged over PSTN facilities that originates and/or terminates in IP format." The mere fact that the statutory framework applies to VoIP traffic – *i.e.*, that the Commission has the authority to implement a bill-and-keep regime for such traffic – does not establish that the Commission exercised that authority in the *Transformation Order* as it relates to this price cap LEC tandem traffic. The *Transformation NPRM*, which Level 3 also cites, actually cuts against its argument, insofar as it recognizes that a terminating carrier *in general* can be a "rate-of-return carrier, price-cap carrier, competitive carrier, or mobile wireless provider" – a list that does not include non-carrier VoIP providers. *See Transformation NPRM* ¶ 510.

[56] Specifically, Level 3 argues that the *FNPRM* seeks comment only on the situation in which one party owns the end office and an unaffiliated third party owns the tandem. Complaint ¶ 54. The *FNPRM* certainly seeks comment on that scenario, but the full discussion in both the *Transformation Order* and the *FNPRM* makes clear that the Commission is still seeking comment on *all* situations in which the tandem owner does not have its own customer. Those situations present fundamentally different issues from the plain-vanilla transition for price cap carriers that own the end office and thus do not have a customer from whom they can recover tandem costs.

by the rule are in fact undecided, and the Commission is currently seeking comment on those issues to refresh the record in the *FNPRM*.

Equally important, however, Level 3's assumption that the intercarrier compensation payments for the tandem services at issue will inevitably be reduced to zero in a bill-and-keep system is not correct. In any bill-and-keep system, there must be a "network edge" that delineates the "point where bill-and-keep applies."[57] In other words, each "carrier [would be] responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge."[58] As the Commission noted in the *FNPRM*, there are "numerous options for defining an appropriate network edge," although a consistently prominent proposal in all of the Commission's intercarrier compensation proceedings since 2001 has been to establish the network edge at the terminating central office or its equivalent.[59] In seeking comment on these issues, the *FNRPM* specifically notes that the Commission had "not received significant comment on the network edge issue up to this point."[60]

Level 3's argument assumes that the Commission has already decided that the network edge for the traffic at issue will be placed at the price cap LEC's tandem – *i.e.*, that the Price Cap Carrier should be responsible for recovering the costs of the tandem from its CMRS or VoIP

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[57] *FNPRM* ¶ 1320.

[58] *Id*.

[59] *Id*. ("[f]or example, the edge could be the location of the called party's end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway" (quotation omitted)). Indeed, proposals to set the network edge at the central office have been at the heart of the Commission's intercarrier compensation proceedings since its original 2001 notice of proposed rulemaking. *See id*. ¶ 1320 n.2386 (describing the staff's "Central Office Bill And Keep" proposal in which the "calling party's network is responsible for the cost of transporting the call to the called party's central office," citing Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime* (FCC, OPP Working Paper No. 33, Dec. 2000)).

[60] *FNPRM* ¶ 1320.

affiliate's end users. But the Commission has not made that decision. Rather, the Commission is still seeking comment on whether the network edge should be placed at the mobile switching center for wireless traffic, and at the media gateway for VoIP traffic.[61] If the Commission ultimately adopts that proposal, then Level 3 would be responsible for delivering the traffic all the way to the mobile switching center or media gateway, and thus would have to pay AT&T for tandem and transport services to deliver the traffic to that network edge.[62] Such tandem charges might not be tariffed in that end-state regime, but it is *not* a forgone conclusion, as Level 3 repeatedly assumes, that a bill-and-keep system necessarily means that the intercarrier compensation payments at issue in this case will be reduced to zero.

The Price-Cap-Carrier-to-affiliate scenarios that Level 3 believes are already covered by the rule in fact pose difficult questions that the Commission has not resolved. For example, reading Rule 51.907(g) to apply to the situation in which a CMRS carrier is the "terminating carrier" and the Price Cap Carrier is its "affiliate" that owns the tandem could have substantial unintended consequences. A price cap LEC would have no practical means of recovering its tandem costs through a CMRS affiliate's end user customer charges. Nor would such a rule be competitively neutral. In Level 3's view, a wireless carrier like AT&T would be expected to recover its LEC affiliate's tandem costs from its wireless end users, while its wireless competitors that have no LEC affiliates, like T-Mobile and Sprint, would not. Fierce price competition in the wireless marketplace would prevent wireless carriers with LEC affiliates from shifting their tandem costs

[61] *Tandem Refresh Public Notice* at 2.

[62] *FNPRM* ¶ 1320 ("carrier [would be] responsible for carrying, directly or *indirectly by paying another provider*, its traffic to [the network] edge" (emphasis added)).

to their wireless customers.[63] Level 3 has offered no reason why a bill-and-keep scheme should discriminate between wireless carriers based on whether they have a LEC affiliate.

The point is that these are precisely the sorts of issues that the Commission set out to consider and resolve in the *FNPRM*. The *Transformation Order* does not address any of these issues, and the Commission received "no significant comment" on them.[64] The rule at issue is an access charge rule that is entitled "Transition of price cap carrier access charges," and that does not mention non-access providers like CMRS or VoIP providers. Applying this rule to these very different scenarios in which the Price Cap Carrier has no tariffed end user would inappropriately prejudge the *FNPRM* and impose *de facto* bill-and-keep and network edge rules on such traffic. There is simply no basis to interpret this rule to apply to situations that Level 3 concedes constitute a significant and growing portion of the marketplace, when such an interpretation could seriously

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[63] *See, e.g.*, Twentieth Report, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 17-69, ¶ 6 (rel. Sept. 27, 2017); Ryan Knutson and Joshua Jamerson, *Verizon Customers Defect As Competition Ramps Up*, The Wall Street Journal, at A1 (Apr. 20, 2017) (reintroduction of unlimited data plans has set off a "bruising price war"), https://www.wsj.com/articles/verizon-for-first-time-loses-core-wireless-customers-1492691308.

[64] Level 3 notes (at ¶ 55) that AT&T previously quoted the Commission's statement that commenters had "express[ed] concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office . . .," but it claims that the Commission was referring to NCTA comments that expressed concern about removing *ex ante* rate regulation from tandem and transport services. It is important, however, to place these various comments in context. None of the party proposals the Commission was considering in 2011, including both the industry "ABC Plan" and NCTA's "Amended ABC Plan," actually proposed a transition to end-state bill-and-keep for terminating traffic, but rather proposed a transition to a uniform transport and termination rate ($0.0007) pursuant to Section 251(b)(5). Moreover, none of those proposals specifically addressed or discussed the situation in which the Price Cap Carrier owns the tandem and a CMRS or VoIP affiliate owns the end office or equivalent facilities. And, notably, NCTA's "Amended ABC Plan" specified that carriers like Level 3 would pay the full transport and termination rate to *both* the tandem owner *and* the end office owner when the two carriers were different; NCTA's principal concern was simply that the tandem rate remain regulated. *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, Comments of NCTA, Attachment at 8-9.

distort competition with no real opportunity for the Commission to consider the possible consequences in a rulemaking.

3. Level 3's Policy Arguments Are Irrelevant And Also Misguided.

Level 3 also claims that the Commission's reading of the rule undermines the Commission's policy objectives. These claims are both mistaken and largely beside the point.

In the *Transformation Order*, the Commission did not set out to address every issue or transition every element of the current system to bill-and-keep. *See supra*, Background. Rather, the Commission consciously pursued a piecemeal approach. *Id*. The *Transformation Order* merely began the transition by focusing on the easiest and most obvious scenarios, which involved certain kinds of terminating traffic. In adopting this partial transition, the Commission had to draw lines: it established a transition for some scenarios but not others. *Transformation Order* ¶ 809.

In this particular instance, the Commission chose to adopt a transition for a price cap LEC's tandem charges when that LEC also owns the end office, which would apply in Years 6 and 7 of the transition.[65] The Commission left the question of how to deal with all other tandem charges, including all such charges when the terminating carrier is a wireless or VoIP provider, to the *FNPRM*. The Commission's decision to start with the first scenario was based entirely on the relative complexity of the issues involved and the state of the record; it did not reflect any particular "policy" decision relating to the tandem services in one scenario versus another. Indeed, the Commission has not yet made any policy decisions about the issues on which it has sought further comment in the *FNPRM*; that is why those issues are in the *FNPRM*. Moreover, the Commission's piecemeal approach to tandem charges was not problematic when the Commission adopted the

[65] As discussed above, this transition also applies to functionally equivalent arrangements of a CLEC by operation of the pre-existing CLEC access charge rules.

Transformation Order, because at that time the Commission had *five years* to complete the *FNRPM* before any transition relating to tandem charges would begin, and it expected to complete the *FNPRM* before then.

To the extent that the limited scope of the transition for tandem services in Rule 51.907(g) creates "gaps" in the Commission's policies *today*, that is an artificial result of the fact that the Commission has never acted in the *FNPRM*. This is unfortunate but not unlawful.[66] It is well-settled that the Commission can choose which problems it wants to tackle and in what order; no one could have claimed in 2011, when the Commission adopted this limited rule, that its decision to proceed in a piecemeal fashion was arbitrary. *Transformation Order* ¶ 809.

Equally important, the fact that the Commission has not resolved the *FNPRM* has no uniform effect on carriers like Level 3, and indeed, Level 3 is ignoring the broader context of the transition. Many of the initial steps the Commission took in the initial portion of the transition – such as the applicable step-downs for intrastate access services, for terminating end office service, and the tandem step down applicable when the price cap carrier owns the tandem and the end office – provide substantial benefits to access customers, including Level 3. At the same time, the Commission determined that it should *not* immediately reduce rates for other categories of access service and terminating tandem services where the price cap carrier does not hand off to a price cap end office. The Commission's decision to delay the transition for these other access services might mean that purchasers of the services pay more than they otherwise would if the Commission had included them in the initial transition, but the Commission found that outcome necessary. It explained that its overall initial transition sought to "strike the right balance between

[66] Contrary to Level 3's insinuations, AT&T has been vigorously arguing for some time that the Commission should resolve the *FNPRM* and complete the transition to the "end-state" bill-and-keep. *See, e.g.*, Forbearance Petition at 3.

our commitment to avoid flash cuts and enabling carriers sufficient time to adjust to marketplace changes," while furthering the goal of overall reform. *Id*. ¶ 802; *see also Transformation NPRM*, ¶ 555 (a more rapid or immediate transition would both complicate universal service reform and add to the "complexity of issues that need to be addressed earlier in the transition process, as compared to an approach that deferred certain types of rate reductions until later in the process."). Level 3 not only ignores this attempt to "strike the right balance," it ignores the fact that CLECs like Level 3 also benefit greatly from the Commission's decision to postpone consideration of this latter set of issues, particularly as they relate to originating access services and 8YY traffic.[67]

For these reasons, all of Level 3's "policy" arguments are misdirected. Level 3 makes a series of policy arguments as if the question in this case is whether the Commission *should* adopt Level 3's position. But the only question in this case is which issues the Commission already addressed in the 2011 *Transformation Order*, and which ones it left for the *FNPRM*. This case does not call upon the Commission to make any policy judgments; Level 3's policy arguments are more properly addressed to the Commission in the *FNPRM*. The proper course for resolving these lingering issues is to complete the *FNPRM* expeditiously, as the Commission now seems to be doing – not to misconstrue and misapply Rule 51.907(g) (and thereby prejudge those issues without a full, industrywide record).[68]

In all events, as discussed above, it is not a forgone conclusion that the Commission will agree with Level 3 in the *FNPRM*, because there are policy arguments on both sides. Level 3's

[67] *See Connect America Fund, et al*., WC Docket Nos. 10-90, *et al*., Comments of AT&T, at 7-8, 10-12 (filed July 31, 2017) (describing CLEC methods of exploiting arbitrage opportunities in the context of originating access for 8YY calls).

[68] AT&T Opp. To Stay Petition at 14 n.14; AT&T's Opposition to CenturyLink's Petition to Reject and to Suspend and Investigate AT&T's Tariff Filings, at 5 n.11 (filed Jun. 20, 2017); *see also* AT&T Forbearance Petition at 3.

main argument stems from its observation that traffic from legacy TDM networks is increasingly shifting to wireless and VoIP networks. Level 3 insists that the Commission's interpretation of the rule, which does not reach these forms of traffic, "undermines the *Transformation Order*'s objectives," meaning the objective of a completed transition to a bill-and-keep system.[69] The rule does not undermine the Commission's objectives at all. The rule is an initial step – a down payment on a completed bill-and-keep scheme – and it fully resolves the subjects it addresses. Again, Level 3 is simply frustrated that the Commission has not yet completed the follow-on *FNPRM* that would resolve the issues Level 3 is raising now, and the seriousness of those issues is a reason for the Commission to resolve the *FNPRM* expeditiously.

Even if Level 3's policy arguments were relevant, none of Level 3's four specific policy arguments support its position.[70] Level 3's first and fourth arguments make essentially the same point: that AT&T's tandem charges for the traffic at issue allegedly harm competition for "downstream" services, by which Level 3 apparently means competition for long-distance customers on the originating end of such calls.[71] Level 3 claims that AT&T's tandem charges are inflated and thus give it a "competitive advantage" over competitors like Level 3, to the extent that Level 3 purchases such services as an input.

Level 3's argument is misguided. AT&T's tandem charges are regulated under price caps and presumptively lawful. Level 3 also has many competitive alternatives to AT&T's tandem and

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[69] Complaint ¶ 38 ("[b]y improperly shielding the rising tide of VoIP- and CMRS-terminated calls from bill-and-keep, AT&T is artificially inflating tandem-switched access service costs . . .").

[70] *See id.* ¶¶ 40-44. Notably, the Commission sought comment on "transitioning *the remaining rate elements* consistent with our bill-and-keep framework" the *FNPRM* notwithstanding the fact that commenters had made many of the same policy arguments Level 3 is making now. *See FNPRM* ¶ 1297.

[71] Complaint ¶¶ 40, 44; Declaration of Edwin Stocker, ¶¶ 13, 16 (attached as Exhibit 9 to Level 3's Complaint) ("Stocker Decl.").

transport services, as the record in the *Intercarrier Compensation* proceeding showed even five years ago.[72] But even if those two points were not true, the rule at issue applies systemically across the industry. All originating carriers, including AT&T, pay the same legacy tandem charges when their customers make long-distance calls that terminate on other wireless or VoIP networks. Indeed, AT&T often pays those tandem charges to Level 3 itself. Although the Commission's end-state bill-and-keep regime for tandem charges will likely be more efficient than the current scheme on an overall basis, the fact that all competitors pay the same tandem charges in the same situations, pending the completion of the *FNPRM*, largely eliminates Level 3's concern about undue "competitive advantages."

In addition, the magnitude of the effects Level 3 claims are unlikely to have any material effect on competition or broadband investment. Level 3 argues that it is paying a specified amount more per month than it would if AT&T had applied the Year Six step-down to reduce the tandem charges at issue to $0.0007 per minute. It claims that monthly amount will rise over the course of the next two years, although that is based mostly on the assumption that AT&T's rate would otherwise have been reduced to zero in Year Seven.[73] In the multi-billion dollar telecommunications marketplace, these amounts are simply too small to change the course of competition in any meaningful way. And that would be true even if the Commission ultimately agrees with Level 3's position that these charges should be transitioned to zero – which, as discussed above, it may not.

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[72] *See, e.g., Connect America Fund, et al.*, WC Docket Nos. 10-90 *et al.*, Reply Comments of AT&T, at 40-41, 45-49 (filed March 30, 2012).

[73] Complaint ¶ 41; Stocker Decl. ¶ 7. It is also based partly on assumptions about the expected growth of wireless traffic and the fact that calls to VoIP and CLEC customers are declining more slowly than calls to Price Cap LEC end offices. Complaint ¶ 41 & n.70.

Level 3's second claim is that, because AT&T can collect these tandem charges only for traffic exchanged in TDM format, maintaining higher tandem rates gives AT&T a "strong incentive to maintain TDM-based interconnection arrangements" instead of transitioning to IP-to-IP interconnection.[74] Once again, this concern, to the extent it applies, applies to all tandem charges on which the Commission has sought comment in the *FNPRM*, including any arrangements that Level 3 has with affiliated or unaffiliated wireless or VoIP providers. The rulemaking proceeding gives the Commission the opportunity to resolve these issues on a competitively neutral basis – rather than applying different rules depending on whether the wireless or VoIP provider has a LEC affiliate or not.

Finally, Level 3 suggests that the disparity in rates may give carriers an incentive to engage in "wasteful schemes" designed to maximize traffic subject to the higher rates. It offers no examples of how such a scheme might work. The argument is in fact extremely dubious, given that AT&T has no choice but to route the call to the provider who has the customer that the *originating caller* has decided to call. AT&T would have no ability to manipulate those routing decisions to increase traffic bound for its wireless or VoIP affiliates.[75]

II. THE COMMISSION SHOULD RULE FOR AT&T ON BOTH COUNTS IN THE COMPLAINT.

A. Count I, Section 201(b).

[74] *Id*. ¶ 42; Stocker Decl. ¶ 14.

[75] By contrast, as AT&T showed in its Forbearance Petition, the Commission's rules are allowing wasteful arbitrage schemes, like access stimulation, to continue to flourish—and inaction on originating access reform has encouraged schemes as to those charges. Rather than adopt a bizarre construction of Rule 51.907(g) to combat phantom access arbitrage schemes, the Commission should act forcefully to stop carriers from engaging in actual unreasonable practices.

In Count I, Level 3 alleges that AT&T's tariff filing is an "unreasonable practice" under Section 201(b) of the Act. Compl. ¶¶ 58-64. For all the reasons just explained, this Count is meritless and should be dismissed.

The interpretation of Rule 51.907(g) adopted by AT&T, all other price cap LECs, the Commission Staff, and the Commission itself is the most reasonable interpretation. That interpretation is compelled not only by the text of Rule 51.907, which applies to "price cap carriers," but by the Commission's explanation in the *Transformation Order* of its initial transition. There, the Commission explained that, while it was adopting a limited transition for tandem services when the price cap carrier owned the tandem and end office, it was not deciding issues about the network edges (because it lacked an adequate record, *id.* ¶ 1320) or the closely related issue of the "the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office" (because commenters had expressed concerns that the Commission was not yet prepared to resolve), *id.*, ¶¶ 1310, 1312. Because the Commission is still deciding the remaining transition and where to place the network edge—and may ultimately decide that, on wireless calls for example, the network "edge could be the location of the called party's . . . mobile switching center," *see Tandem Refresh Notice*, n.10—Level 3's interpretation of Rule 51.907(g) is unreasonable. Under Level 3's view, the Commission has repeatedly sought comment on transition issues that it supposedly already decided within the "plain terms" (Compl. ¶ 61) of Section 51.907(g). That is incorrect, and the interpretation adopted by AT&T, the Staff, and the Commission is far more consistent with the text of Rule 51.907(g) and the purposes of the Commission's initial multi-year transition.

In any event, Count I also fails because AT&T did nothing "unreasonable"—and certainly did not violate Section 201(b)—by implementing the interpretation of Rule 51.907(g) adopted by

the Commission (*Tandem Refresh Notice*, at 2), its Staff, and other price cap carriers. Although Level 3 is correct that the Commission "implements and enforces Section 201(b)'s 'just and reasonable' requirement through various rules and regulations," Compl. ¶ 60, Level 3 ignores that the Commission and its Staff, to date, have refused to implement Section 201(b) in the manner advocated by Level 3. To the contrary, AT&T and other price cap carriers filed tariffs, on a streamlined basis pursuant to Section 204(a)(3), that reflected the current implementation of Section 201(b) and Rule 51.907(g) by the Commission and its Staff. There is nothing "unreasonable" or "unjust" in doing so. While the Commission can change its interpretation prospectively if it provides an appropriate and lawful rationale, Level 3 provides no explanation that would justify a finding that AT&T either violated Section 201(b) or must be liable retroactively, when it merely followed the existing guidance from the Commission and its Staff as to how Rule 51.907(g) and Section 201(b) should be implemented.[76]

B. Count II—Section 202(a).

In Count II, Level 3 alleges that AT&T's tariffs implementing Rule 51.907(g) are "unreasonably discriminatory." Compl. ¶¶ 65-70. This Count is also meritless and should be dismissed.

For all the reasons explained above, the Commission and its Staff have reasonably determined that the services that are subject to the step-down in Rule 51.907(g)—tandem services when the price cap carrier owns the tandem and the end office—are not "like" the other tandem

[76] Although Level 3 asserts a right to damages and "full refund," *e.g.*, Complaint ¶ 64, there should be no damages phase because AT&T has not violated the Act or any Commission rule. In any event, if any damages phase were permitted, AT&T would have substantial defenses, including but not limited to defenses based on the due process clause and Section 204(a)(3), that any damages are unlawful and improper. The same defenses would apply to any damages or refund claim asserted under Section 202(a), *see* Complaint ¶¶ 70, 71.

services (including tandem services when a price cap carrier hands off traffic to a wireless carrier, VoIP provider, competitive LEC, or any third party) that are not included within the initial transition. When the price cap LEC owns the tandem and an end office, the price cap carrier's recovery can be handled entirely within the existing access charge regime. In the other cases, the Commission has determined that the appropriate intercarrier compensation to be paid, if any, needs to be decided in conjunction with other issues like the network edge. Because AT&T's tariff (and the tariffs of all other price cap carriers) follow the Commission's reasonable determinations in adopting its partial transition, the services at issue are not 'like' services, and there is no unreasonable discrimination within the meaning of Section 202(a).

Level 3's Section 202(a) claim is, at bottom, an attempt to second-guess the Commission's judgments in 2011 as to how best to implement a partial transition, one in which only certain rate elements would transition and others would be addressed, along with other issues, at a later time after receiving additional comment. Once the Commission decided to adopt a phased and partial transition, the Commission necessarily had to decide what rate elements would be part of the initial transition and the pace of that transition. *See Transformation Order* ¶ 809 ("Specifying the timing and steps for the transition to bill-and-keep requires us to make a number of line-drawing decisions. Although we could avoid those decisions by moving to bill-and-keep immediately, such a flash cut would entail significant market disruption to the detriment of consumers and carriers alike.").

Level 3 does not challenge the Commission's general authority to draw those lines—if it were making such a challenge, then Level 3 should have raised it back in 2011 when the Commission announced its transition. In fact, Level 3's own preferred interpretation of the transition and of Rule 51.907(g) is not that all access services, or even all tandem and transport services, are subject to the same transition and step-downs. For instance, Level 3 asserts that third-

party tandem traffic should be excluded from the initial transition in Rule 51.907(g) and billed at higher rates. *See, e.g.*, Level 3 Tariff, § 15.1.3.4.5.2 (charging rates above $0.0007 for tandem switching "Terminating – To 3rd Party"). Level 3 fails to explain why that distinction does not implicate Section 202(a).[77] Further, Level 3's position is that, under Rule 51.907(g), AT&T and other price cap LECs should charge $0.0007 per minute for tandem services when AT&T's price cap LEC uses a tandem to terminate a call to AT&T Mobility, but should charge a higher rate when that LEC terminates a call to any unaffiliated wireless carrier. Here again, Level 3 makes no effort to explain why this difference in price would not also violate Section 202(a) under its theory – in fact, as explained above, such an interpretation of Rule 51.907(g) would raise concerns about competitive neutrality, and those concerns were one of the reasons why the Commission decided to seek further comment rather than transition all tandem services to bill-and-keep as the default regime.

As such, Level 3's position is not that different tandem rates are unreasonably discriminatory, but is instead an argument that the Commission should have drawn the lines in its initial transition differently than it did. But that challenge – which should have been raised, if at

[77] The evidentiary support cited by Level 3 for its § 202(a) claim (Complaint ¶ 68 n.107 (citing Stocker Decl. ¶ 4)) is a single paragraph in a declaration asserting that the "tandem-switched transport access" that Level 3 purchases on calls that terminate in AT&T's incumbent LEC territory is "the same tandem-switched transport access services – under the same tariffs and consisting of the same network functionalities" as when calls are terminated to wireless or other AT&T affiliates. Stocker Decl. ¶ 4. However, Level 3's own tariff offers "Switched Transport" including tandem switching at two different rates—one for terminating to a third party and a lower rate for terminating to a Level 3 end office. Level 3 Tariff, § 15.1.3.4.5.2 (third party), 15.1.3.4.5.3 (Level 3 end office). Thus, despite Level 3's arguments here, Level 3 customers buy the same "tandem switched transport access services—under the same tariff" but pay different rates, depending on whether the Level 3 tandem hands off a call to a Level 3 end office or to a third party. Nothing in the Level 3 tariff explains how these tandem switching services Level 3 provides have different "network functionalities." As such, if the tariffs of price cap carriers violate Section 202(a), then so too does the tariff filed by Level 3.

all, back in 2011 – is necessarily more limited, and Level 3 does not come close to establishing that the Commission's judgments as to how it drew the lines in order to establish its initial transition, or the step-downs in Rule 51.907(g) are arbitrary or unlawful. To the contrary, as AT&T has explained, the Commission reasonably determined that the situation in which a price cap carrier hands off a call to a price cap end office presented the most straightforward case for the initial transition to bill-and-keep as the default regime; and, that other instances, including third-party traffic and traffic to price cap wireless affiliates, entailed more difficult policy questions that should be deferred and resolved along with network edge issues.

CONCLUSION

For the foregoing reasons, the Commission should reject Level 3's claims and dismiss the Complaint.

Respectfully submitted,

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